

ORIGINAL

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
Amendment of Rules and Policies)	CS Docket No. 97-98
Governing Pole Attachments)	

Reply Comments of KMC Telecom Inc.

I. Introduction

KMC Telecom Inc. ("KMC") hereby submits its reply comments in the above-captioned proceeding. KMC is a competitive local exchange carrier ("CLEC") dedicated to providing competitive local services in metropolitan areas throughout the United States. KMC is a facilities-based telecommunications carrier that constructs and operates state-of-the-art fiber optic networks in its service areas. KMC was formed in 1995 with the vision of bringing competition to markets that still remain predominately the exclusive domain of the incumbent local exchange carriers ("ILECs"). Today, a little over two and one half years after its founding, KMC has received authority to provide intrastate telecommunications services in 14 states, has completed construction of 8 networks, and has an additional 10 networks underway.

In developing business and engineering plans for its markets, KMC determined early on that access to the poles and conduit controlled by electric utilities and the ILECs is critical to KMC's speed to market and its ability to offer competitively-priced services. As a relatively new and growing CLEC, KMC has spent much of the last year negotiating pole attachment and conduit access agreements with electric utilities and ILECs throughout the U.S. Unfortunately, KMC's experience in negotiating pole attachment agreements with many electric utilities does not mirror the negotiating

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environment many electric utilities have attempted to describe as favorable in their comments.¹ In fact, KMC has confronted unequal bargaining power weighted heavily in favor of the utilities, and has met stern resistance to incorporating into its pole attachment agreements the standards embodied in Section 224 of the Communications Act² and the implementing regulations adopted by the FCC in its Local Competition Order.³ Many electric utilities have expressed clearly their distaste for Section 224 and presented KMC with “take it or leave it” agreements that do not meet the statutory and regulatory requirements of Section 224.

KMC is filing these reply comments to provide the Commission with a view from the “other side of the table” in negotiating pole attachment and conduit access agreements with utilities.⁴ Based on its recent experience, KMC believes it is critical that the Commission continue to effectuate Congress’ intent in the Telecommunications Act of 1996 to strengthen Section 224 by

¹ See e.g., Comments of American Electric Power Service Corporation, Commonwealth Edison Company, Duke Power Company, Florida Power and Light Company and Northern States Power Company (“Electric Utilities”) at 8-14; Joint Comments of the Electric Utilities Coalition (“Joint Comments”) at 8.

² 47 U.S.C. § 224.

³ First Report and Order, In the Matter of Implementation of the Local Competition Provision in the Telecommunications Act of 1996, 11 FC Rcd 15,449, CC Docket NO. 96-98, released August 8, 1996, 61 Fed. Reg. 45, 476 (1996) (“Local Competition Order”), rev’d in part, Iowa Utilities Board v. Federal Communications Commission, 1997 Westlaw 403401.

⁴ KMC’s comments apply to access to all utility facilities subject to Section 224 – poles, duct, conduit and rights-of-way – that are defined in Section 224(a)(4) as “pole attachments.” KMC’s comments do not address the technical issues raised in the Notice or the technical suggestions raised in the comments. KMC reserves its right to comment on these issues in the subsequent proceeding to be initiated by the Commission pursuant to Section 224(e).

recognizing and confirming that the present and future success of local competition are directly dependent upon the ability of telecommunications carriers to have unimpeded and non-discriminatory access to utility facilities for pole attachments. While many of the comments filed by the utilities suggest that the FCC should move solely to negotiated agreements, the hostile environment that KMC has encountered in attempting to negotiate pole and conduit access agreements suggests this is not a viable alternative. Furthermore, the deregulatory aspirations of the utilities can only be fulfilled by Congress which, with knowledge of all the changed conditions in the cable and telecommunications industry since 1978, chose to reinforce and extend, rather than vitiate, the protections of Section 224 in the Telecommunications Act of 1996.

In the FCC's continued efforts to implement Section 224 and in response to the comments filed in this proceeding, KMC requests that the Commission:

- (1) clarify that the statutory formula in Section 224(d) establishes the lower and upper boundaries for permissible just and reasonable rates that a utility may charge cable television companies and telecommunications carriers until 2001 in order to dispel the notion set forth in certain comments that Section 224 does not create a ceiling for calculating just and reasonable pole attachment rates for both cable television companies and telecommunications carriers;
- (2) adopt the finding of the Cable Service Bureau in its January 17, 1997 letter ruling that it is contrary to Section 224 for a utility to pressure a party seeking access to the utility's poles or conduit to waive all its rights and remedies provided under law as a condition for pole and conduit access agreements and declare such provisions unreasonable and unenforceable as a matter of law;
- (3) adopt a specific formula determining the boundaries for just and reasonable rates for conduit access;
- (4) clarify that a telecommunications carrier's right of access to a utility's facilities for pole attachments includes a right first to attach to space that is available and does not require rearrangement or modification of existing attachments; and

(5) confirm the FCC's finding in its Local Competition Order that Section 224 applies to transmission facilities and clarify application of the statutory rate methodology to transmission poles.

II. The Commission Should Affirm that the Statutory Formula in Section 224(d) Defines the Permissible Range of Just and Reasonable Pole Attachment Rates

Section 224(d)(1) sets forth a precise definition of "just and reasonable" pole attachment rates. This definition, unchanged by the amendments in the Telecommunications Act of 1996, establishes the boundaries for permissible pole attachment rates. Section 224(d)(3) makes this formula applicable to telecommunications carriers seeking access to a utility's poles and conduit after enactment of the Telecommunications Act of 1996 and until 2001. In spite of these clear and compelling statutory provisions, however, KMC has found in negotiating pole and conduit access agreements that many utilities refuse to provide attachments at rates that meet the statutory requirements.⁵ In several negotiations, utilities have insisted that KMC pay pole attachment rates that exceed by multiples the statutory formula and the rate paid by the cable television provider. Often utilities neither disclose the rate paid by the cable television provider nor agree to represent that the rate offered is the rate paid by the cable television provider and complies with Section 224. Indeed, one utility that would not agree to an attachment rate within the statutory formula advised KMC that KMC had three options: (1) stay off its poles; (2) sue the utility; or (3) pay the excessive

⁵ As noted by the Association for Local Telecommunications Services ("ALTS") in its comments, telecommunications carriers routinely pay fees to utilities for pole and conduit access in addition to the attachment rate. See ALTS Comments at 3. These fees can include make ready costs, pole removal and replacement costs, tree trimming costs, and possibly bonds. The utilities generally contend that these fees are not subject to the statutory formula. Even if the fees are outside the statutory formula of Section 224(d) they must be "reasonable" to meet the requirements of Section 224.

rates (and waive its legal rights to challenge the rates). Without question, each choice is contrary to the underlying intent and goal of Section 224.

As KMC's experience consistently demonstrates, despite the clear mandate of Section 224 and even after the Telecommunications Act of 1996, many utilities continue to attempt to circumvent the requirements of Section 224 through prolonged and protracted negotiations. Contrary to the claims of the utilities in their comments,⁶ the utilities hold -- and do not hesitate to use -- almost all the bargaining power in pole attachment and conduit access negotiations. While utilities generally recognize that they can no longer legally deny access to their poles or conduit at will, the utilities exercise complete control over the timing of access and thereby the introduction of local competition. The utilities control the timing of access by controlling the negotiation of the agreements, resisting a telecommunications carrier's insistence on limiting the rate to the maximum permitted rate, and controlling the scheduling and completion of make ready work that must be completed before installation of the attachments. In one case, KMC was forced to construct its own conduit (at extraordinary expense) after months of repeated requests to obtain and to negotiate a draft pole attachment agreement and then several more months of failed attempts to negotiate reasonable make-ready costs. This utility's intentional behavior delayed not only KMC's entry into the market and construction of its network, but also the introduction of local competition. This experience is not atypical but the environment commonly faced by competitive telecommunications carriers seeking to attach to utility facilities.

⁶ See e.g., Electric Utilities Comments at 8-14; Joint Comments at 8.

In today's era of emerging local competition, access to the poles and conduit of electric utilities and the ILECs remains critical to construction of competitive networks. Contrary to the claims of certain commentators,⁷ telecommunications carriers do not have unlimited or plentiful options for network construction. Indeed, access to existing poles is often the only means of aerial construction. This lack of options is attributable to several factors. First, many local governments limit or prohibit new entrants from installing their own network poles as a condition for granting local authorization to use the public rights-of-way. As in other areas, such as wireless services, collocation and use of existing poles is preferred by local governments. These government bodies increasingly are pushing carriers of all types (wireline and wireless) toward the collocation option. Some local ordinances may even eliminate the option of above-ground construction unless it is done through attachment to a utility's existing poles. Second, underground construction may not be an option based on cost. The cost of constructing underground may be cost-prohibitive when compared to above-ground construction and attachment to poles. Cost-effective construction is critical to CLECs like KMC seeking to provide competitive services at competitive prices. Third, the cost of underground construction may put the CLEC at a competitive disadvantage if the costs of underground construction are prohibitive and the CLEC's competitors have attached their facilities on less costly poles. For these, and other reasons, access to existing utility poles and conduit is important for competition to develop.

Last year Congress appropriately recognized the importance of pole and conduit access to competition in local telecommunications by amending Section 224 to extend and to expand its

⁷ See e.g., Joint Comments at 11.

protection for telecommunications carriers. This statutory protection will be undermined if utilities can continue to insist on rates above the statutory formula as permitted “negotiated rates.”

Accordingly, KMC requests that the Commission clarify in this proceeding that the statutory formula in Section 224(d) sets the boundaries, minimum and maximum, for permissible rates for both cable television providers and telecommunications carriers and that rates above the upper boundary are *per se* unreasonable and unjust.

III. The Commission Should Declare Waiver Provisions Unreasonable and Unenforceable as a Condition for Access Under Section 224

In KMC’s pole attachment negotiations with electric utilities, the utilities routinely have resisted KMC’s request to incorporate Section 224 as the governing law and have insisted that KMC waive its rights to administrative and judicial review of the agreements’ terms and conditions under Section 224. The waiver provisions routinely are sought in negotiations where the utilities have refused to provide KMC attachment rates that fall within the just and reasonable boundaries set forth in Section 224(d).

In a January 17, 1997 letter ruling, the Cable Services Bureau found to be unenforceable a utility’s hypothetical requirement that a telecommunications carrier waive all of its legal rights as a condition of a pole attachment agreement. Specifically, the Bureau found the waiver an impermissible attempt “to subvert the Congressional intent underlying Section 224” and the result “unenforceable as a matter of law.”⁸ Since the letter ruling was issued, KMC has had mixed reaction from the utilities. Some utilities have agreed to eliminate waiver provisions from proposed

⁸ See Letter Ruling From Meredith J. Jones, Chief, Cable Services Bureau to Danny E. Adams, Esq., dated January 17, 1997 (DA 97-131) at 3-4.

agreements. Unfortunately, other utilities have dismissed the letter as “hypothetical” and have attempted to distinguish their particular waiver or agreement from the hypothetical.

The ability of a cable television provider or telecommunications carrier to challenge an agreement as inconsistent with Section 224 is fundamental to both a telecommunications carrier’s ability to negotiate an access agreement that comports with Section 224 and to ensure a recalcitrant utility’s continued compliance with the statute. Insistence on a waiver provision in a pole attachment agreement shifts the bargaining power in favor of the utility and eliminates the countervailing force of Section 224’s protections, especially in situations where the CLEC must choose either the waiver and access or no waiver and litigation to force access. A clear ruling from the Commission that such waivers are impermissible under Section 224 would be a strong and affirmative step towards equalizing the current unequal bargaining power of utilities and telecommunications carriers in negotiating pole and conduit access. Accordingly, the Commission should use this proceeding as an opportunity to affirm the finding of the Cable Services Bureau and declare unreasonable and unenforceable under Section 224 terms and conditions that require a telecommunications carrier or cable television provider to waive its legal rights to review or challenge a pole attachment and conduit access agreement before the FCC or in court.

IV. The Commission Should Adopt a Specific Formula For Conduit Access

KMC applauds the Commission for proposing a specific formula for conduit access. KMC’s negotiations of a conduit rate have been hampered by the absence of a clear formula or standard. As in the context of pole access, a conduit formula is necessary to establish the permitted boundaries of just and reasonable rates for conduit access. Certainty in the regulatory process will result in more effective negotiations and will promote prompt access to conduit. In addition, the need for a conduit

access formula is important as local governments continue to seek the elimination of utility poles and encourage underground construction. As competitive networks continue to be built, efficient use of existing conduit will speed competition and reduce disruption to local rights-of-way. Accordingly, KMC encourages the Commission to adopt a specific formula for access to utility-owned conduit.


V. A Telecommunications Carrier's Right of Access Should Include a Right First to Attach to Available Space That Does Not Require Rearrangement of other Attachments

The right of telecommunications carriers to non-discriminatory access to utility facilities under Section 224 has been tempered by the frequent requirement that competitive carriers attach their facilities to a location on the poles specified by the utility irrespective of the availability of alternative space. Unrelated to safety or capacity concerns, CLECs routinely are directed by utilities to attach their facilities at specific points on a pole. These locations, however, often require the rearrangement or modification of the pole or other attachments even when other pole space is available to accommodate the attachment without any rearrangement or modifications. Often utilities seek to direct attachments to certain locations merely because that is the "way" it has been done. The advent of local competition, however, has changed the way things are done as recognized by the amendments to Section 224 enacted by Congress in the 1996 Telecommunications Act. Attachment in the available space that minimizes any movement of other attachments certainly is the most efficient for the CLEC and all other attachers (including the utility) and minimizes service disruption without compromising the utility's safety or capacity concerns. Accordingly, KMC requests that the Commission clarify that telecommunications carriers have a right under Section 224 first to attach their facilities to available space that does not require relocation of other attachments or modifications to the utility's facilities.

VI. The Commission Should Clarify Proper Application of the Just and Reasonable Rate Methodology to Utility Transmission Facilities

The Commission should use this proceeding to clarify the appropriate application of the methodology for determining just and reasonable rates for attachments to transmission facilities under Section 224. As MCI appropriately notes in its comments, transmission towers fall within the definition of "poles" that are subject to the right of access under Section 224.⁹ Due to the differing characteristics of transmission and distribution poles, there is confusion over how to apply Section 224's rate methodology to transmission facilities. KMC endorses MCI's proposal for a further notice of proposed rulemaking on this issue and continued application of the existing Section 224 methodology until that rulemaking is completed.

Respectfully submitted,


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⁹ MCI Telecommunications Corporation Comments at 21.

CERTIFICATE OF SERVICE

I, Petrina M.E. Chavis, hereby certify that I caused a copy of the foregoing Reply Comments of KMC Telecom Inc. to be sent first-class mail this 11th day of August, 1997 to the each of the following:

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